

1 DAVID Z. CHESNOFF, ESQ.
2 *Pro Hac Vice*
3 RICHARD A. SCHONFELD, ESQ.
4 California Bar No. 202182
5 CHESNOFF & SCHONFELD
6 520 South Fourth Street
7 Las Vegas, Nevada 89101
8 Telephone: (702) 384-5563
9 dzchesnoff@cslawoffice.net
10 rschonfeld@cslawoffice.net
11 Attorneys for Defendant, ALEXANDER SMIRNOV

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 * * * * *

15 UNITED STATES OF AMERICA,) CASE NO. 2:24-CR-00091-ODW
16)
17 Plaintiff,) **DEFENDANT’S NOTICE OF**
18) **MOTION AND MOTION TO DISMISS**
19 v.) **COUNT TWO OF THE INDICTMENT**
20)
21 ALEXANDER SMIRNOV,)
22)
23 Defendant,) **Honorable Otis D. Wright II**
24) **September 23, 2024 at 10:00 a.m.**

25 PLEASE TAKE NOTICE that on September 23, 2024, or as soon thereafter
26 as counsel may be heard, Defendant, ALEXANDER SMIRNOV (“Mr. Smirnov”),
27 by and through his attorneys, DAVID Z. CHESNOFF, ESQ., and RICHARD A.
28 SCHONFELD, ESQ., of the law firm of CHESNOFF & SCHONFELD, will ask this

1 Honorable Court to enter an order Dismissing Count Two of the Indictment pursuant
2 to the authority vested in Federal Rule of Criminal Procedure 12(b)(3)(B).

3
4 This Motion is made and based upon the attached Memorandum of Points and
5 Authorities, the papers and pleadings on file herein, and any argument that is heard.

6
7 On August 19, 2024, defense counsel conferred with the United States
8 Government who will oppose this Motion and will assert that the Indictment pleads
9 facts to support the elements of the charge in Count two.

10 Dated this 19th day of August, 2024.

11
12 Respectfully Submitted:

13 CHESNOFF & SCHONFELD

14
15 /s/ David Z. Chesnoff

16 DAVID Z. CHESNOFF, ESQ.

17 *Pro Hac Vice*

18 RICHARD A. SCHONFELD, ESQ.

19 California Bar No. 202182

20 520 South Fourth Street

21 Las Vegas, Nevada 89101

22 Telephone: (702)384-5563

23 dzchesnoff@cslawoffice.net

24 rschonfeld@cslawoffice.net

25 Attorneys for Defendant

26 ALEXANDER SMIRNOV
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

A. Background

Mr. Smirnov was charged by way of a two-count Indictment filed on February 14, 2024. The Indictment charged Mr. Smirnov with: 1) Making False Statements to a Government Agent, in violation of 18 U.S.C. § 1001; and 2) Falsification of Records in a Federal Investigation, in violation of 18 U.S.C. § 1519.

The Indictment alleges that Mr. Smirnov served as a confidential human source (“CHS”) for the FBI for several preceding years. As to Count two, the Indictment asserts:

Between on or about June 26 and 30, 2020, in the Central District of California, the defendant, ALEXANDER SMIRNOV, did knowingly cause the making of a false entry in an FBI Form 1023, a record and document, with the intent to impede, obstruct, and influence a matter that the Defendant knew and contemplated was within the jurisdiction of the United States Department of Justice, a department and agency of the United States, in violation of Title 18, United States Code, Section 1519, and Title 18, United States Code, Section 2.

This recitation is defective. The Indictment, as shown, fails to allege the requisite elements of an offense under 18 U.S.C. § 1519: it fails to allege that on June 26 and June 30, 2020, Mr. Smirnov knowingly falsified a record that was part of an actual or contemplated investigation.

1 Equally defective is paragraph 23, which alleges:

2 On or about June 26, 2020, FBI Pittsburgh contacted the Handler regarding
3 the 2017 1023. That same day, the Handler spoke with the Defendant [Mr.
4 Smirnov], who was in Los Angeles, by telephone. The information the
5 Defendant provided the Handler was memorialized on a Form 1023 (hereafter
6 the “2020 1023”), an official record of the FBI, which was finalized on June
30, 2020.

7 In fact—and, reinforcing the Indictment’s failure to state a required element
8 of the charged offense (*viz.*, that there be an actual or contemplated investigation)--
9 the Indictment instead refers to the recited information as being a “non-relevant”
10 discussion regarding the uncharged Hunter Biden.
11

12 Thus, paragraph 24 states in part:

13 During their call on June 26, 2020, when the Handler asked the Defendant
14 about the “brief, non relevant discussion about former [Public Official 1]'s
15 son, [Businessperson 1], who is currently on the Board of Directors for
16 Burisma Holdings,” the Defendant described, for the first time, two purported
17 meetings and two purported phone calls with various Burisma executives
18 where Businessperson 1 and Public Official 1 were discussed.

19 Accordingly, the Indictment states only that the alleged (and, supposedly
20 unlawful) June 26, 2020 conversation pertained to the Government characterized as
21 a prior “non-relevant” discussion. Tellingly, there is no allegation in the Indictment
22 that Mr. Smirnov intended to create a false record (or even knew that a record would
23 be created) related to an actual or contemplated investigation of Hunter Biden.
24
25
26
27
28

B. Statement of the Law:

The foregoing defects compel dismissal of Count two. Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move to dismiss an indictment that “fail[s] to state an offense.” In considering such a motion, a court must, first, accept the Indictment’s allegations as true and, second, “analyz[e] whether a cognizable offense has been charged.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). To determine whether a “cognizable offense” has been charged, “the district court is bound by the four corners of the indictment.” *Id.* A motion to dismiss an indictment can be determined before trial “if it involves questions of law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986).

To repel a challenge under 18 U.S.C. § 1519, as charged in Count two, the government bears the burden of alleging facts to demonstrate that: “(1) [Mr. Smirnov] knowingly falsified a record or document; (2) [Mr. Smirnov] acted with the intent to impede, obstruct, or influence an actual or contemplated investigation; and (3) the investigation concerned a matter within the jurisdiction of the U.S. Department of Justice or the Federal Bureau of Investigation.” *United States v. Gonzalez*, 906 F.3d 784, 793 (9th Cir. 2018) (emphasis added).

Applying these principles to the present case yields a straightforward result. An express element of a Section 1519 offense is that the Defendant intended to

1 obstruct an actual or contemplated investigation. *United States v. Katakis*, 800 F.3d
2 1017, 1023 (9th Cir. 2015); here, however, there is no assertion in the Indictment
3 that there was an actual or contemplated investigation *or* that the alleged June 26,
4 2020 conversation was *part* of that unstated “investigation.” Moreover, there is no
5 assertion that Mr. Smirnov was aware that an FBI form 1023 would be created as a
6 result of the alleged conversation.
7
8

9 Accordingly, the Indictment as to Count two is facially deficient as it fails to
10 assert that: 1) Mr. Smirnov had knowledge that an FBI form 1023 would be created;
11 2) Mr. Smirnov acted with intent to falsify any such record; and most significant, 3)
12 that there was an actual or contemplated investigation of Hunter Biden.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **C. Conclusion**

2
3 For the foregoing reasons, Mr. Smirnov respectfully requests that this Court
4 grant this motion and dismiss Count two of the Indictment.

5 DATED this 19th day of August, 2024.

6
7 Respectfully Submitted:

8 CHESNOFF & SCHONFELD

9
10 /s/ David Z. Chesnoff

11 DAVID Z. CHESNOFF, ESQ.

12 *Pro Hac Vice*

13 RICHARD A. SCHONFELD, ESQ.

14 California Bar No. 202182

15 520 South Fourth Street

16 Las Vegas, Nevada 89101

17 Telephone: (702)384-5563

18 rschonfeld@cslawoffice.net

19 dzchesnoff@cslawoffice.net

20 Attorneys for Defendant

21 ALEXANDER SMIRNOV
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2024, I caused the forgoing document to be filed electronically with the Clerk of the Court through the CM/ECF system for filing; and served on counsel of record via the Court's CM/ECF system.

/s/ Camie Linnell
Employee of Chesnoff & Schonfeld